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Supreme Court, U.S.
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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

DOROTHY MACKEY,

Petitioner,

v.

DAVID W. MILAM, TRAVIS ELMORE, AND UNITED STATES OF AMERICA,

Respondents.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the United States Court of Appeals lack jurisdiction under 28 U.S.C. § 1292(b) over an interlocutory appeal where the district court's certification of the "controlling question of law" is not contained in the order to be appealed, as provided in § 1292(b), nor in an amended version of that order, as allowed by Fed.R.App.P. 5(a), but rather appears only in a separate order entered over ten months later, when a purported "collateral order" appeal of the same order under 28 U.S.C. § 1291 has already been fully briefed and is ready for argument?

2. Is it state law or federal law which determines whether an officer in the United States Air Force was "acting within the scope of his office or employment," as used in 28 U.S.C. § 2679(d), which is defined in 28 U.S.C. § 2671 in the case of members of the military to mean "acting in line of duty," and thus whether a case alleging severe sexual harassment by members of the military shall be removed to federal court under the Westfall Act upon certification of the United States Attorney?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Dorothy Mackey, David W. Milam, Travis Elmore, and the United States).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOROTHY MACKEY respectfully petitions this Court for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit filed and entered on September 10, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals (per Siler, J., with Krupansky, J.; Cole, J., dissenting), is reproduced in Appendix A. The decision is published at 154 F.3d 648. The district court's unpublished "Order" (a 17-page memorandum opinion), denying the government's motion to dismiss under Fed.R.Civ.P. 12(b)(6) and granting the plaintiff's motion to remand to state court, dated December 10, 1997, filed December 11), is reproduced as Appendix B (Susan B. Dlott, J.). The district court's Order dated May 21, 1997, and entered May 27, 1997, granting in part the government's motion for reconsideration is Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit reversing the orders of the district court was filed September 10, 1998. Appendix A. The order denying petitioner Mackey's timely petition for rehearing was filed October 27, 1998. Appendix E. On January 19, 1999, under No. A-580, Justice Stevens granted petitioner's application for an extension of time to file this petition to and including March 26, 1999.

Rules 13.1, 13.3, 13.5, 30.1 (1997 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, FEDERAL STATUTE, AND RULE INVOLVED

Section 1292 of the Judicial Code provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order ....

28 U.S.C. § 1292(b).

The Federal Tort Claims Act provides, in pertinent part:

> (b) Subject to the provisions of chapter 171 [§§ 2671-2680] of this title, the district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ... for personal injury ... caused by the negligent or wrongful act or omission of any employee

of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346. Section 2671 of title 28 adds:

Definitions

As used in this chapter [171] and sections 1346(b) and 2401(b) of this title, the term --

"Federal agency" includes ... the military departments ....

"Employee of the government" includes ... members of the military or naval forces of the United States ....

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States ... means acting in line of duty.

The Westfall Act amendments to the Federal Tort Claims Act provide, in pertinent part:

(d)(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States .... Such action or proceeding shall be deemed to be an action

> or proceeding brought against the United States under the provisions of this title ..., and the United States shall be substituted as the party defendant. ....

Rule 5 of the Federal Rules of Appellate Procedure provides, in pertinent part:

> **(a) Petition for Permission to Appeal.** An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

Fed.R.App.P. 5(a).

STATEMENT OF THE CASE

This petition presents two important questions arising out of the government's attempt to remove to federal court, and there to defeat, a civil action brought in Ohio by a former Air Force officer against her supervisors, as individuals, alleging severe forms of sexual harassment, including assault.

a. Procedural History

The petitioner, Dorothy Mackey, is a former Captain in the United States Air Force. She brought suit in December 1994 in the Montgomery County, Ohio, Court of Common Pleas against respondents Milam and

Elmore, alleging that from the fall of 1991 until fall 1992 they subjected her to repeated and severe forms of sexual harassment while serving as her superior officers. After the case had proceeded for some 15 months in state court, the United States Attorney filed certifications under the Westfall Act, 28 U.S.C. § 2679(d)[1]. The case was thus removed to the United States District Court for the Southern District of Ohio, where the government sought to substitute the United States as defendant.

The plaintiff-petitioner promptly filed a motion for remand to the state court. The government then moved to dismiss the case for failure to state a claim on which relief could be granted, claiming intramilitary immunity and other defenses. Had this motion been granted, the result would likely have been a dismissal of the action under the Feres doctrine (Feres v. United States, 340 U.S. 135, 146 (1950)) and 28 U.S.C. § 2680.

The district court, exercising its authority under Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), determined that the complaint described conduct of the defendants which was not "within the scope of [their] office or employment" within the meaning of § 2679-(d)(1) and therefore ordered that the United States not be substituted, that the case proceed against the individual defendants, and that it be remanded to state court. Appx. B (12/10/96 order, filed 12/11/96). The court thus dismissed the defendants' motions as moot.

On reconsideration under Fed.R.Civ.P. 59(e), the district court declined to revisit its fundamental holding defining the "scope of employment" under Ohio law as applied to the facts alleged in petitioner's complaint.

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[1] See Statutes and Rules Involved.

However, the district court agreed with the government's suggestion that discovery be allowed on the true facts underlying the "scope of employment" question. Accordingly, it vacated its order resubstituting the individuals as defendants and the order remanding to state court. App. C (5/21/97 order, entered 5/27/97). Despite having thus prevailed in part on its Rule 59(e) motion, the government on July 21, 1997, filed a notice of appeal from both the district court's December 11, 1996, and May 27, 1997, orders. By order dated July 31, 1997, on concurrence of the parties, the district court entered a stay of all proceedings pending appeal.

At about the same time it filed its appellate brief, which claimed "collateral order" jurisdiction under 28 U.S.C. § 1291[2], the government on September 30, 1997, filed in the district court a "Motion to Certify 'Interlocutory' Decision for Appellate Review." The motion expressly requested certification in order to seek leave to appeal only the May 21, 1997, order (entered May 27) partially denying reconsideration, and not the antecedent December 10, 1996 order (entered December 11, 1996). The government did not seek an amendment of the May order to make it appealable, as provided in Fed.R.App.P. 5(a).[3] By Order filed April 22, 1998, Judge Dlott granted the certification, in the form requested by the government, on the issue of whether the individual respondents-defendants were acting within the scope of their employment as determined under the respondeat superior doctrine under Ohio tort law. App. D. By then, the case

[2] See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

[3] See Statutes and Rules Involved.

had been fully briefed in the court of appeals and oral argument was about to be scheduled.

On appeal, a divided panel of the Sixth Circuit reversed. App. A. The division of opinion was over the proper outcome of the scope-of-employment question under Ohio law. The court apparently assumed that the issue of scope of employment, defined in the military context under the Federal Tort Claims Act to mean "in line of duty," 28 U.S.C. § 2671,[4] is to be determined under state law, even when that question determines whether the federal court will have jurisdiction under id. § 2679(d), because that same phrase incorporates state law to determine liability under id. § 1346(b). The opinion implies that the government applied to the Sixth Circuit under § 1292(b) for leave to appeal the May 21, 1997, order, as certified by the district court, App. A5, although there is no reference to such a filing on the appellate docket. Permission to appeal is granted in the opinion. 154 F.3d at 650; App. A5.[5] A timely petition for rehearing was denied, Judge Cole dissenting. App. E.

On motion of the appellee (petitioner Mackey), the Sixth Circuit by order dated December 14, 1998, stayed its mandate to allow the filing of a petition for certiorari.[6]

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[4] See Statutes and Rules Involved.

[5] The court of appeals therefore did not reach the question of collateral order jurisdiction under § 1291. See 154 F.3d at 850 n.1; App. A5.

[6] The court in fact granted that stay to and including April 6, 1999, to allow for the filing of a certiorari petition pursuant to a 60-day extension of time.

b. Statement of Facts

Petitioner Dorothy Mackey joined the U.S. Air Force through the Reserve Officer Training Corps in 1983. By 1991 she had been promoted to Headquarters Squadron Section Commander of Aeronautical Systems Division, Wright-Patterson Air Force Base (WPAFB), in Dayton, Ohio. From the Fall of 1991 until her separation in the Fall of 1992,[7] petitioner was responsible for programs designed to ensure physical fitness and readiness of military personnel. During this period, according to the complaint, petitioner was subjected to escalating sexual harassment (including assault) by each of her immediate supervisors, respondents Cols. David W. Milam (then Inspector General and Chief of Staff for the Aeronautical Systems Division at WPAFB), and Travis Elmore (then Assistant Chief of Staff for Aeronautical Systems Division of WPAFB and Assistant Inspector General).

Both Milam and Elmore regularly leered at petitioner's body during debriefings, making particular effort to ogle her legs even when she sat behind a meeting table. Each made inappropriate comments toward petitioner. Elmore often referred to petitioner's breasts, commenting once that he could see that the cold of his office was affecting her nipples. Milam referred to petitioner's perfume and make-up, as well as to her appearance in the skirted version of the military uniform, asserting "This is what I prefer." Elmore, after ordering

[7] The court of appeals' opinion mistakenly states that petitioner left the Air Force in 1994. She did seek reinstatement in 1994. Because this case has so far proceeded only on the pleadings, the entire statement of facts in this petition consists of a narrative summary of the complaint.

her to stand and turn in the skirted uniform, stared directly at her legs and stated, "Very nice, very nice."

Milam and Elmore also each invaded petitioner's personal space. Respondent Milam would stand so close to petitioner she could feel his breath on her face and neck. Milam often locked the door when meeting alone with petitioner in his office. Elmore and Milam each derided petitioner for her apparent distress, embarrassment or protests in reaction to their misconduct.

Milam and Elmore each touched petitioner inappropriately on several different occasions. Milam often squeezed petitioner's arm or touched her back while she talked. With a smirk, Milam acknowledged to petitioner that he knew his "touching" made her uncomfortable.

In addition to stroking her arms and shoulders, Elmore inappropriately placed his hands on petitioner's neck, waist and leg on distinct occasions. Once, when petitioner expressed to Elmore that she was not feeling well, he approached her and put his hands on her waist, around her back, thumbs pressing in on her stomach; he then moved his hands down the front of her pants all the way to her pubic area, despite petitioner's protests.

Separately, Elmore and Milam made unsuccessful attempts to get petitioner to socialize with them. On a regular Sunday workday, Milam invited petitioner to watch football any Sunday in his office. Elmore persistently invited petitioner to lunch and out dancing.. Elmore enticed petitioner to an off-base bar late one night under a professional pretense. Because of her earlier refusals, Elmore told petitioner he had her resume and would review it with her, as she had requested months earlier when she had begun to contemplate leaving the Air Force. When petitioner arrived, Elmore had ordered

food and said he had left the resume in his car. In addition to touching petitioner's neck and back, Elmore's hands dropped below her waist. During this encounter, Elmore asked petitioner to "slow dance," which she refused. He later tried to prevent her from leaving the bar by blocking the driver's side door of her car, insisting he follow her home, and even telling her he wanted a night cap at her home, all of which, again, she refused.

Retaliating for her resistance to the harassment, Milam undermined petitioner's authority by not taking requested measures against an insubordinate technical sergeant under her supervision. Milam attempted to humiliate her by making inappropriate comments about her body in the presence of co-workers. When petitioner reached out for support to a friend who was a civilian employee, Milam ordered petitioner to cease contact with that person. He also failed to provide common professional support by refusing to attend a luncheon where petitioner was to be honored as a nominee for "Federal Woman Supervisor of the Year." Expressing his displeasure with petitioner's response to his behavior, respondent Milam habitually whacked petitioner on the back while talking, hard enough to knock her off balance.

Respondents' concerted pattern of behavior toward petitioner not only disrupted her ability to work effectively, but also harmed her psychologically and emotionally, ultimately forcing her to abandon a ten-year career in the military.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The district court's jurisdiction was invoked in this case by removal from an Ohio state court on certification of the United States Attorney under the Westfall Act, 28

U.S.C. § 2679(d)(2). Upon substitution of the United States as sole defendant pursuant to that provision, the district court would have had jurisdiction under 28 U.S.C. § 1346(b)(1). The certification was successfully challenged in the district court, App. B & C, but that court's order was reversed by the Sixth Circuit. App. A. The government invoked the jurisdiction of the court below under 28 U.S.C. § 1291 on the basis of the collateral order doctrine, and alternatively under id. § 1292(b) by certification of an interlocutory order presenting a controlling question of law. App. D. This petition challenges the Sixth Circuit's finding of § 1292(b) jurisdiction; the "collateral order" issue was not reached below, App. A5, and is therefore not ripe for consideration here.

REASONS FOR GRANTING THE WRIT

1. This case presents an important and unresolved question of federal appellate jurisdiction: whether interlocutory order jurisdiction exists where the district court issues a "certification," many months after an order has been appealed as "collaterally final," that the order presents a "controlling question of law," without having included that certification in the order itself, as provided in 28 U.S.C. § 1292(b), or in an amended order, as allowed under Fed.R.App.P. 5(a).

The court below lacked interlocutory jurisdiction in this case, because the procedure followed by the government and the order entered by the district court did not comply with the clear requirements of 28 U.S.C. § 1292(b) and Fed.R.App.P. 5(a). This Court has long adhered to the complementary doctrines that grants of

appellate jurisdiction must be strictly construed and that implementing procedural rules must be scrupulously followed. The Court should grant certiorari in this case to establish that these principles apply with full force to § 1292(b), which grants jurisdiction to review interlocutory orders under specified circumstances.

Because the order the government wished to challenge was never amended to contain the statutorily prescribed certification, the court of appeals never acquired jurisdiction to permit this interlocutory appeal. The district court's order denying the government's motion to dismiss and granting the plaintiff-petitioner's motion for remand was filed on December 10, 1996, App. B, and entered as a judgment in the civil case the next day. On December 24, rather than appeal, the government filed a timely motion to alter or amend that judgment under Fed.R.Civ.P. 59(e).[8] The motion did not request that the December 10 order be amended under Fed.R.App.P. 5(a) to contain a certification under § 1292(b).[9] Ruling on the government's motion, the district court noted that it had not previously addressed the respondents' motion to dismiss on the basis of "intra-military immunity," because its judgment had been to

[8] The district court's memorandum erroneously states that the motion was filed January 31, 1997. App. C2. Were that so, the motion would have been untimely, and likewise the later notice of appeal. Fed.R.App.P. 4(a)(4)(C). The district court docket shows December 24 as the filing date, however, within ten business days of the entry of the judgment, as required. January 31 was in fact the filing date of the government's reply to petitioner's answer to the motion.

[9] See Statutes and Rules Involved.

remand to state court, where the judge had already denied a motion to dismiss. However, the district court stated that it found the state judge's reasoning in rejecting the application of the intramilitary immunity doctrine persuasive, and declared that it would adopt that analysis. App. C3.

The district court further agreed, in the reconsideration order, that in ruling on the motion for remand it should have considered the government's conditional request for an evidentiary hearing to test the averments of the complaint insofar as they bore on the scope of employment question.[10] In an order dated May 21, 1997 (filed May 23 and entered May 27, 1997), the court therefore vacated the order for remand and allowed discovery in anticipation of a hearing. App. C4-7.

Again the government did not seek amendment of the district court's order under Rule 5(a) to include a certification that any of the issues decided were "controlling questions of law" warranting allowance of an interlocutory appeal. Instead, nearly two months later, on July 21, 1997, claiming that the December 11 and May 27 orders were collaterally final, the government filed a notice of appeal to the Sixth Circuit.[11] Over two months

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[10] Such hearings are appropriate where the court has ruled that the complaint's averments on their face take the defendants' conduct outside the scope of their employment, even though the U.S. Attorney has certified otherwise. Obviously, the government could not ensure its employees the benefit of Westfall Act protection if substitution of the United States as defendant could be defeated by the plaintiff's skill in pleading alone.

[11] Consistent with its claim of collateral finality only, the government pointedly did not appeal from the judgment the

after that, on September 30, 1997 -- the very eve of filing its opening brief on appeal -- the government filed a motion in the district court captioned "Motion to Certify 'Interlocutory' Decision for Appellate Review." This motion requested certification so as to seek leave to appeal the May 21, 1997, order (entered May 27) partially denying reconsideration; the motion made no reference to the antecedent December 10, 1996, order (filed December 11, 1996, as was a judgment). Again, the government did not seek an amendment of the order it wished to appeal, as provided in Fed.R.App.P. 5(a).

By Order filed April 22, 1998, over petitioner's objection, the district judge granted certification for interlocutory appeal, in the form requested by the government, of the issue whether the individual respondents-defendants were acting within the scope of their employment as determined under the respondeat superior doctrine under Ohio tort law (assuming they committed the acts alleged in the complaint). App. D. By then, the case had been fully briefed in the court of appeals, including the question of whether there was "collateral order" jurisdiction, and oral argument was about to be scheduled. The government may have filed with the Sixth Circuit an application for permission to appeal, although no indication of such a filing appears on the docket.[12] The court of appeals did not assign a new

_____(cont'd)

district court had entered, but rather from the two orders. Cf. Thermstrom Products, Inc. v. Hermansdorfer, 423 U.S. 336, 352-53 (1976) (orders remanding to state court are neither "final" nor "collateral" under § 1291).

[12] The government did serve a copy of such a petition on petitioner's counsel, however. Petitioner does not seem to have contested jurisdiction under § 1292(b) below.

docket number, but seems to have referred the matter to the merits panel which was about to hear the purported collateral order appeal. In its published opinion, the court granted the necessary permission, App. A5, and addressed only the question certified by the district court.

In permitting the appeal and reaching the merits, the court of appeals acted without jurisdiction, because the district court never complied with Fed.R.App.P. 5(a). As a result, the order given review did not contain the statement required by 28 U.S.C. § 1292(b), and the petition to the circuit (if filed at all) was not filed within the required time from the entry of the specified kind of order. Grants of federal appellate jurisdiction must be strictly construed, California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 579 (1987), and the applicable procedural requirements are to be scrupulously followed. Smith v. Barry, 502 U.S. 244, 248 (1992); see Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978). This Court should grant certiorari to establish that these principles apply fully to interlocutory appeals by permission under 28 U.S.C. § 1292(b).

Section 1292(b) provides that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have juris-

> diction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order ....

(emphasis added). Further clarifying and elaborating the procedures to be followed, the Federal Rules of Appellate Procedure state:

> An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court .... An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

Fed.R.App.P. 5(a) (emphasis added). The statute and rule, read together, are perfectly clear. If the district judge includes in the interlocutory order the certification language prescribed by § 1292(b), then an aggrieved party may promptly (within ten days) seek permission from the court of appeals to appeal.

As stated in Rule 5(a), if an interlocutory order does not contain the required language, but a party wishes to seek an interlocutory appeal, the party must move to amend the order.[13] There is no provision for the

[13] This may be done "at any time," although tardiness in seeking certification may bear on the exercise of discretion whether to grant the motion to amend. 20 *Moore's Federal Practice* § 305.14[1], at 305-12 (3d ed. 1998). Apparently, the order could also be amended sua sponte.

issuance of a separate order of certification. "In this situation it appears that the court must issue an amended order adding only the certification." 19 *Moore's Federal Practice* § 203.32[1], at 203-96.1 to -97 (3d ed. 1998). If the motion to amend is granted, the ensuing petition seeks permission to appeal the interlocutory order, as amended, and must be filed within ten days. The reason for the rule is apparent: the petition under § 1292(b) serves the function of a notice of appeal, and like a notice it must be filed within a specified, short, jurisdictional period of time after entry of the order to be appealed. Because the government never sought to have the order it wished to challenge amended, and that order never was amended to contain the prescribed certification, no petition was filed in this case within ten days of the entry of the challenged order, either in its original form or as amended. The court of appeals therefore never acquired jurisdiction to allow this appeal.

The district court's certification was contained in an independent order, App. D, not in an amendment of the order the government sought to challenge (which is App. C), as required by Rule 5(a).[14] As a result, a government petition for permission to appeal was not filed within ten days of the entry of the order sought to be appealed, as required by both the statute and the rule. The court of appeals accordingly lacked jurisdiction to grant the petition (if one was filed) and to decide the

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[14] The reason the respondents failed to comply with the mandated procedure may be that the order in question was already under appeal, and it is well established that the district court lacks jurisdiction to alter or amend an order that is the subject of a pending appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982).

appeal under § 1292(b). 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3929, at 376 (2d ed. 1996); see Baldwin County Welcome Center v. Brown, 466 U.S. 147, 161 (1984) (per curiam) (Stevens, J., dissenting).[15]

The court of appeals' decision cannot be salvaged -- at least not in this Court -- by reference to the collateral order doctrine under 28 U.S.C. § 1291, as initially invoked by the government. The court of appeals did not address this alleged alternative ground of jurisdiction, App. A5; this Court, if it agrees that § 1292(b) jurisdiction was lacking, should therefore at most remand for further consideration. Alternatively, the Court might simply dismiss the alternative jurisdictional claim under § 1291 as plainly without merit. The original December 11, 1996, judgment remanding the case to state court ended this case on the merits in federal court and may have been appealable on that basis, but the government did not appeal; rather, it

[15] In addition to the untimeliness of the respondents' petition, the record raises another question about the court of appeals' § 1292(b) jurisdiction. The only order sought to be appealed in the government's motion for certification (as in its draft petition for permission to appeal, as served on petitioner's counsel) was the May 27, 1997, order granting reconsideration in part and denying it in part. The question addressed by the court of appeals -- whether the conduct described in the state court complaint was within the scope of the defendants' employment under Ohio law -- was not decided in the May order, however; on that ruling, the latter order merely refused to reconsider. For this reason as well, the court of appeals may have exceeded its jurisdiction under § 1292(b) when it decided the government's appeal. See Foman v. Davis, 371 U.S. 178 (1962).

sought reconsideration. As a result, the judgment was rendered nonfinal by the district court's agreement to allow discovery and then a hearing on whether the individual defendants, although accused of acting outside the scope of their employment, had actually not done so, and so were entitled to Westfall Act protection. App. C. An appeal could then be brought only if the order was collaterally final, but it was not.

The notice of appeal filed in July 1997 (as opposed to any § 1292(b) petition in April 1998) did reference, and thus bring before the court of appeals, both the December 1996 and May 1997 orders, including the decision on scope of employment. But those rulings cannot reasonably be described as separate from and unrelated to the merits (respondents' conduct being at the heart of the scope issue, also), nor as having conclusively determined the question of scope of employment in the case, which are both requirements of the collateral order doctrine. Van Cowenberghe v. Biard, 486 U.S. 517, 529 (1988); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988); Coopers & Lybrand, 437 U.S. at 468-69. Hence, the decision of the court of appeals addressed an order which was not collaterally final. E.g., Jamison v. Wiley, 14 F.3d 222, 230-31 (4th Cir. 1994); Schrob v. Catterson, 967 F.2d 929, 936-38 (3d Cir. 1992). The court below lacked jurisdiction under § 1291, just as it did under § 1292(b).

For all these reasons, this Court should issue a writ of certiorari to review and address the jurisdictional defects in the court of appeals' review of the district court's order refusing to reconsider the order determining under the law of Ohio that petitioner's complaint described conduct not falling within the scope of respondents' federal employment.

2. The lower courts have wrongly assumed, in conflict with this Court's suggestion in Gutierrez de Martinez, that removal of a tort case against a federal military member from state court to federal court turns on a state-law rather than a federal-law standard of whether that employee was acting "within the scope" of his or her "employment," that is, "in line of duty."

The courts below, like virtually all other federal courts, have mistakenly assumed that the scope-of-employment judgment they must exercise in reviewing a Westfall Act certification under 28 U.S.C. § 2679(d)[16] requires exclusively the application of state rather than federal law. Because that critical error is based on a misreading of this Court's cases and of the controlling statute, this Court should grant certiorari in order to give guidance to the lower courts on this recurring and critically important question.

The Westfall Act, passed in 1988 to grant federal employees even greater personal protection from suit than they already enjoyed, and in particular to override the holding of this Court in Westfall v. Erwin, 484 U.S. 292 (1988), states that:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed ... to the

[16] See Statutes and Rules Involved.

> district court of the United States .... [There,] the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(2). The case is then handled as one under the Tort Claims Act.

Subject to a variety of exceptions and defenses, the FTCA waives sovereign immunity so as to allow suits directly against the government for:

> the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The Westfall Act, while echoing the FTCA's "scope of employment" language, does not couple it with the "under circumstances ... in accordance with the law of the place" qualification.

In 1955, this Court summarily decided that under the plain language of § 1346(b), state not federal law controls the question of the government's liability for the acts of its employees under the Federal Tort Claims Act, even when the federal worker for whose acts the government might be held liable was a member of the military. Williams v. United States, 350 U.S. 857 (1955) (per curiam).[17] The same phrase -- "acting within the scope of

[17] That decision was rendered against the position of the Solicitor General that a uniform federal standard was both necessary and consistent with the statute. Brief for the United States, No. 24, Oct. Term 1955, at 35-36. It is not necessary in the present case to revisit the question whether Williams was

his office or employment" -- is used in the Westfall Act, 28 U.S.C. § 2679(d)(1), for a different purpose: to determine when the federal court must assume jurisdiction and the United States shall be substituted as the sole defendant. Notably, when used in § 2679(d), the "scope of office or employment" language is used without the accompanying phrase, "in accordance with the law of the place where the act or omission occurred," as found in § 1346(b). Nevertheless, the lower federal courts, virtually without exception, have assumed, as did the court below, that this jurisdictionally-determinative issue in Westfall Act cases is to be decided solely by reference to state law. See Annot. (J.F. Rydstrom), *Federal Tort Claims Act: When Is a Member of the Armed Forces "Acting in Line of Duty" Within Meaning of 28 U.S.C.A. § 2671*, 1 ALR Fed. 563 (1969 & 1998 Supp.).

This case illustrates the bizarre situation in which vagaries of a state's agency law can determine whether the federal court sitting in a given district has jurisdiction

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correctly decided; as discussed below, if a minimum federal standard is applied to the "line of duty"/"scope of employment" question under § 2679(d), then § 1346(b) will never be invoked in the case. Nevetheless, petitioner would be remiss if she did not invite reconsideration of Williams, pointing out that the decision in that case was issued literally without a word of explanatory analysis. Moreover, just last Term, in the Title VII context, this Court eloquently elaborated the reasons why federal employment discrimination laws should implement uniform, national standards of respondeat superior determined as a matter of federal law, without varying from state to state. See Burlington Industries, Inc. v. Ellerth, 524 U.S. --, 118 S.Ct. 2257, 2265-67, 141 L.Ed.2d 633, 648-50 (1998); Faragher v. City of Boca Raton, 524 U.S. --, 141 L.Ed.2d 662, 679-85, 118 S.Ct. 2275, 2285-90 (1998).

over a case and whether the United States government may or may not be sued. This Court has already suggested that the perception of the lower courts (followed in the courts below), that state law supplies the rule of decision under § 2679(d), is incorrect. In Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), the plurality, without citing Williams, called the Westfall Act scope-of-employment determination for removal and substitution purposes a "federal question." 515 U.S. at 435. The dissenters did not disagree.[18] The lower federal courts, including the courts below, have apparently assumed they are bound by Williams to use state law in this fundamentally different context. See App. A, B; see generally Annot. (D.T. Kramer), *Federal Tort Claims Act: when is a government officer or employee "acting within the sope of his office or employment" for purpose of determining government liability under 28 USCA § 1346(b)*, 6 ALR Fed. 373 (1971). This Court should grant certiorari to examine this important question, and to clarify that at least when some peculiarity of a state's application of the law of agency conflicts with a fundamental aspect of federal policy, as it does here, the federal rule must control.

The lower courts' assumption about the controlling authority of state law in the context of Westfall Act certifications is all the more dubious in the case of military defendants in state court suits, for whom

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[18] Without even hinting that "scope of employment" might be a state law issue, the four Gutierrez dissenters viewed it as merely a question going to jurisdiction and thus not a "federal question" under 28 U.S.C. § 1331. 515 U.S. at 441-42. Justice O'Connor, concurring, did not comment on the issue. Id. at 437-38.

Congress specially provided in 28 U.S.C. § 2671 that "scope of employment" means "in line of duty,"[19] a uniquely federal concept with a long history of statutory usage and judicial construction in the context of military benefits determinations. See, e.g., 10 U.S.C. §§ 1074a-(a)(1), 1076(a)(2)(C), 1201, 1203, 1204; 38 U.S.C. § 1110, 50 U.S.C.Appx. § 593(b)(3). In that context, to fulfill the remedial purposes of such legislation, the scope of the phrase is very broad. See 32 Op. Att'y Gen. 12 (1919); 7 Op. Att'y Gen. 149 (1855).

Yet even in that generous setting, there is a fixed star of limitation: an injury or disability which is due to the servicemember or veteran's own willful misconduct is never viewed as incurred "in line of duty." As provided in 10 U.S.C. § 1207, "Each member of the armed forces who incurs a physical disability ... that resulted from his intentional misconduct ... shall be separated from his armed force without entitlement to any benefits under this chapter." Likewise as to veterans, under 38 U.S.C. § 105, an "injury or disease incurred during active military, naval or air service" cannot be "deemed to have been incurred in line of duty" if it resulted from "the veteran's own misconduct ...." The Attorney General has repeatedly recognized this invariable limiting principle. See 32 Op. Att'y Gen. 12 (1919); 17 Op. Att'y Gen. 172 (1881); 2 Op. Att'y Gen. 589 (1833). So has the Court of Claims. Sorrough v. United States, 155 Ct.Cl. 464, 295 F.2d 919 (1961); Moore v. United States, 48 Ct.Cl. 110 (1913).

The military and veterans' departments agree with this limitation. See, e.g., 32 C.F.R. § 728.21(d) ("line of

[19] Section 2671 of title 28 is reproduced in the Statutes Involved.

duty" rule for reservists' medical and dental care eligibility; expressly excluding conditions "incurred as a result of the reservist's own misconduct"); 38 C.F.R. § 3.1(m) (definition of "in line of duty" for purpose of eligibility for veterans' benefits; excludes "result of the veteran's own willful misconduct"), id.(n) (defining "willful misconduct" as requiring "conscious wrongdoing or known prohibited action"), id.(y)(4) (eligibility of former prisoners of war limited if detention or internment "was the proximate result of the serviceperson's own willful misconduct"); 38 C.F.R. § 3.301(a) (defining "line of duty" for purposes of basic entitlement to veterans' benefits, excluding cases of death or disability resulting from "veteran's own willful misconduct"), accord, id.(b). Likewise, the Army regulation governing the conduct of "line of duty investigations" sets forth as one of its basic principles that "Injury or disease proximately caused by the member's intentional misconduct or willful negligence is 'not in LD -- due to own misconduct.'" AR 600-8-1 ¶39-5.a (1986).

The House Committee on the Judiciary, after holding hearings on the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act") reported to the House -- without reference to the law of any particular state -- that under those amendments the "scope of employment" limitation included "common law torts," but that "If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable." H.Rep. No. 100-700, 100th Cong., 2d Sess. 5 (1988). Requested during the hearing to provide examples of situations where the Attorney General would not certify a federal worker's alleged misconduct

as being "within the scope" of his or her employment, the Department provided a list of nine examples from published cases, three of which involved sexual misbehavior. *Legislation to Amend the Federal Tort Claims Act*, Hearing Before Subcomm. on Admin. Law & Gov't Relations of House Comm. on Jud., 100th Cong., 2d Sess., serial no. 55, at 129-30 (1988).

The Solicitor General has not hesitated to acknowledge the same limitation before this Court. Discussing the meaning of the term "line of duty" in 28 U.S.C. § 2671, as a special definition of "scope of employment" under the FTCA, the government explained:

> Congress has expanded the 'line of duty' concept in such legislation [granting benefits to servicemembers or their dependents] to reward them for the sacrifices caused by their separation from civilian life and for the understandable and desirable purpose of making benefit payments to such servicemen and their dependents in all situations except where the injury or death (1) was the proximate result of the serviceman's own misconduct ....

Brief for the United States, Williams v. United States, No. 24, Oct. Term 1955, at 17.[20] If a particular state chooses to treat willful misconduct as being within the scope of a person's employment under that state's own law,[21] that doctrine cannot be accepted under the

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[20] The Williams brief was filed by Solicitor General (later Judge) Simon E. Sobeloff, and co-signed by Assistant Attorney General Warren E. Burger.

[21] It is by no means clear, notwithstanding the decision below,

Westfall Act -- certainly not in a case with a military defendant -- without defeating a fundamental Congressional understanding of the Act's coverage, and the firmly-settled meaning of its terms, nor without defeating the limitations that the national military departments have placed on the benefits available to their members for almost 200 years. Indeed, if a uniform "willful misconduct" exclusion is not read into § 2671's use of the term "line of duty," it is difficult to see what that statute adds to the "scope of employment" limitation found in § 2679, which in turn must be read as incorporating, in all cases, at least an "egregious misconduct" limitation.

As noted in 38 C.F.R. § 3.1(n), the concept of "willful misconduct" in the military context must include not only "conscious wrongdoing" but also "known prohibited action." This bipartite standard follows, if nothing else, from the culture of obedience that is necessary to the success of the military mission. That obedience must include compliance with the military departments' strong and unequivocal stands against sexual harassment and abuse by superior officers. 10 U.S.C. § 1561(a) (Congressional mandate that military is to investigate complaints of sexual harassment); 32 C.F.R. § 51.4 (policy to eliminate sexual harassment), id. § 51.3 (definition, including conduct like that alleged by petitioner), id. § 51.5(b)(4),(6), id. § 191.4(f) (elimination of sexual harassment by civilian employees of military); 32 C.F.R.

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that Ohio is such a state. The Ohioan district judge, analyzing Ohio law, ruled that the respondents' conduct, as alleged in the complaint, was outside the scope of their employment, App. B, and the dissenting Ohioan federal circuit judge agreed. App. A10-A18. The 2-1 decision below was authored by a Kentuckian. See App. A1.

part 154, appx. H (sexual harassment is form of "sexual misconduct" which is disqualifying for receiving security clearance for sensitive classified material); cf. 10 U.S.C. § 893, UCMJ art. 93 (maltreatment, including severe sexual harassment, is military crime).

Under all these laws and policies, it could not be more clear that sexual harassment by a supervisor is not in "line of duty" or "within the scope of [military] employment," because it is a form of "willful misconduct." As the Solicitor General argued in Williams:

> [C]ertainly where, as here, the regulations reveal that a particular activity is definitely not beneficial to the service and is not to be undertaken, a court would not be justified in holding the serviceman to be within his employment while carrying on that precise activity ....

Brief for the United States, Williams v. United States, No. 24, Oct. Term 1955, at 35. This conclusion is the same one that the Court reached last year and declared in the context of national employment law. "The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." Burlington Industries, Inc. v. Ellerth, 524 U.S. --, 118 S.Ct. 2257, 2267, 141 L.Ed.2d 633, 650 (1998); Faragher v. City of Boca Raton, 524 U.S. --, 141 L.Ed.2d 662, 679-85, 118 S.Ct. 2275, 2285-90 (1998). This Court should grant the requested writ of certiorari to settle this important point, as it applies to control the federalization of a lawsuit under the Westfall Act, and to correct the Sixth Circuit's erroneous invocation and questionable interpretation of Ohio's law of agency, which it applied to defeat the peti-

tioner's right to have her day in court against the individual respondents.[22]

The question whether the use of state law to determine the scope of liability, as provided in 28 U.S.C. § 1346(d), also requires the use of state law to determine federal court jurisdiction under § 2679(d) is an important question, worthy of this Court's consideration, particularly in view of the possible conflict between the decision in Williams and the language of Gutierrez de Martinez. Petitioner Mackey's instant petition should be granted.

CONCLUSION

The court below erred in reversing the district court and holding that on the facts alleged in petitioner's complaint, the defendants-respondents acted within the scope of their employment under Ohio law, and thus "in line of duty" under the Westfall Act, when they sexually

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[22] In correcting the error below, the Court should also disapprove the circuit's reaching out, in an advisory opinion that went beyond the bounds of dictum, to announce that the doctrine of intramilitary immunity would apply to require dismissal of this case on remand. App. A9. That question was not then before the court of appeals and is not presented here. Whether the Feres doctrine (Feres v. United States, 340 U.S. 135 (1946)) should be expanded to cover suits not only against the government in federal court, but also against individual former military supervisors in state court, was not before the court below on the § 1292(b) interlocutory appeal it accepted. (The district court did not reach it in the December 1996 order, but "adopt[ed] the reasoning" of the state trial judge's ruling on the question when ruling on reconsideration. App. C3.) The question is a controversial one, on which courts have differed. See Day v. Massachusetts Air National Guard, 1999 WestLaw 44728 (1st Cir., Jan. 29, 1999).

abused and harassed her while acting as her superior officers in the Air Force. For the foregoing reasons, petitioner DOROTHY MACKEY prays that this Court grant her petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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March 26, 1999.

APPENDIX A

154 F.3d 648
78 Fair Empl.Prac.Cas. (BNA) 244

Dorothy MACKEY, Plaintiff-Appellee,
v.
David W. MILAM, Travis Elmore, and United States of America, Defendants-Appellants.

No. 97-3859.
United States Court of Appeals,
Sixth Circuit.
Argued June 11, 1998.
Decided Sept. 10, 1998.

Edward Himmelfarb (argued and briefed), Barbara L. Herwig (briefed), U.S. Dept. of

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Justice, Civil Div., Washington, DC, for Appellants.

Joanne Jocha Ervin (argued and briefed), Dayton, OH, for Appellee.

Before: KRUPANSKY, SILER, and COLE, Circuit Judges. SILER, J., delivered the opinion of the court, in which KRUPANSKY, J., joined. COLE, J. (pp. 652-655), delivered a separate dissenting opinion.

OPINION

SILER, Circuit Judge.

Plaintiff, Dorothy Mackey, initially filed this action in Ohio state court alleging that defendants, David W.

Milam and Travis Elmore, her superior officers in the United States Air Force, sexually harassed her. The Department of Justice authorized representation of Milam and Elmore, and the case was removed to federal court with the United States substituted as defendant. The district court, however, determined that under applicable Ohio law, Milam and Elmore were not acting within the scope of their employment when they allegedly sexually harassed Mackey. It therefore rejected substitution of the United States as defendant and remanded the case to the Ohio state court. On the United States's motion, the district court certified its scope of employment decision for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). For the reasons that follow, we find that Milam and Elmore were acting within the scope of their employment and therefore REVERSE the district court's order.

I.

Mackey was a Captain in the Air Force. Milam and Elmore were her two immediate superior officers during the times in question. Mackey alleges that on several occasions, Milam and Elmore made inappropriate sexual advances toward her.

In her complaint, Mackey states that at their first meeting, Milam locked the door to his office while she was alone with him. He often "ogled" her and made comments when she wore her skirted uniform. He also stood very close to her and inquired about her perfume and make-up. Milam also engaged in "unwanted touching" and made sexual comments in her presence.

Mackey made even more serious allegations against Elmore in her complaint. She alleged that he often stared at her breasts and made comments about her slender

waist and her appearance in the skirted uniform. During meetings, he leaned back in his chair so that he could see under the table when she wore her skirted uniform. During one meeting, after Mackey's neck popped, Elmore began massaging her neck. On another occasion, he began touching her ankle and legs after she injured her knee. At another time, he placed his hands around her waist in order to "measure" it. During one meeting, Mackey commented that she was not feeling well. At that point, Elmore began replicating a pelvic exam by moving his hands down Mackey's stomach. Finally, Elmore invited Mackey to a local bar late one evening for the stated purpose of working on her resume. She met him at the bar, but when she started to leave, he initially stopped her and prevented her from entering her car.

Mackey left the Air Force in 1994. She alleges that both Milam and Elmore, who were still on active military duty, subsequently gave unfavorable assessments of her work to prospective employers.

In 1995, Mackey filed a complaint in Ohio state court against Milam and Elmore in their individual capacities, alleging various violations of Ohio common law and of Ohio's civil rights statute. The defendants moved for summary judgment in state court on the basis of intramilitary immunity, but the state court denied that motion.

In the spring of 1996, the Department of Justice authorized representation of Milam and Elmore. The U.S. Attorney filed a certification that the defendants were acting within the scope of their employment under the Westfall Act, 28 U.S.C. § 2679(d)(2). The case was removed to federal court with the United States

substituted as defendant. The case therefore became one against the United States pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2679(d)(1).

---------- **Page 154 F.3d 650 follows** ----------

The United States moved to dismiss on the ground that FTCA claims for injuries that arise incident to military service are barred by the *Feres* doctrine. *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

The district court denied the United States's motion to dismiss and rejected the substitution of the United States as defendant. On the scope of employment issue, the court determined that under Ohio law, Milam and Elmore were not facilitating or promoting the business of the United States and were therefore not acting within the scope of their employment. Therefore, Milam and Elmore were not entitled to have the United States substituted as defendant. The court noted that the case had been litigated for some time in state court and remanded the matter with Milam and Elmore resubstituted as defendants.

In response, the United States filed a Rule 59(e) motion to alter or amend the judgment. The court denied that motion in part and granted it in part in an order dated May 23, 1997. The court refused to revise its order concerning the scope of employment issue and rejected the defendants' alternative argument that they were entitled to intramilitary immunity. However, the court did agree that where facts are disputed, the court must hold an evidentiary hearing to determine whether the plaintiff has produced sufficient threshold evidence that the events in question occurred before ruling on the immunity issue. Therefore, the court vacated its earlier order and ordered an evidentiary hearing, as requested

by the United States, for the purpose of determining whether there was evidence that the acts alleged by Mackey in her complaint occurred.

The United States appealed and urged this court to take jurisdiction under the collateral order doctrine. It also filed a motion with the district court to certify the scope of employment decision for interlocutory appeal under 28 U.S.C. § 1292(b). The district court granted that motion and framed the question for interlocutory appeal as follows: "Whether the defendant Air Force officers were acting within the scope of their employment under Ohio law when they allegedly engaged in sexual harassment of the Plaintiff, an Air Force officer who worked for them."

II.

[1] Under 28 U.S.C. § 1292(b), this court may, "in its discretion, permit an appeal to be taken from" an interlocutory order where the district court has certified that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Because we agree with the district court that the scope of employment issue is a controlling question of law and that resolution of the issue would advance the litigation, we take jurisdiction of this appeal under 28 U.S.C. § 1292(b).[1]

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[1] Defendants also argue that this court would have jurisdiction over this appeal under the collateral order doctrine, even in the absence of the district court's certification. However, we decline to reach that alternative argument.

III.

[2] [3] [4] A scope certification by the U.S. Attorney pursuant to 28 U.S.C. § 2679(d)(2) "does not conclusively establish as correct the substitution of the United States as defendant in place of the employee," *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995), but "provides *prima facie* evidence that the employee was acting within the scope of employment." *RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1143 (6th Cir. 1996) (citation omitted). Under the Westfall Act, "[w]hether an employee was acting within the scope of his employment is a question of law ... made in accordance with the law of the state where the conduct occurred." *Id.* This court therefore reviews the district court's determination *de novo*. *Coleman v. United States*, 91 F.3d 820, 823 (6th Cir. 1996).

[5] The district court relied primarily upon the Ohio Supreme Court's decision in *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d

---------- **Page 154 F.3d 651 follows** ----------

584 (1991), a case in which a church pastor was accused of engaging in nonconsensual sexual conduct with a member of his congregation. The Ohio court held that the church could not be held liable under a *respondeat superior* theory of liability as the pastor was not acting within the scope of his employment because his behavior was not "calculated to facilitate or promote the business for which the servant was employed." *Id.* at 587 (citation omitted). The district court in this case therefore relied on *Byrd* to hold that Milam and Elmore were acting outside the scope of their employment because sexual harassment did not facilitate the business of the Air Force.

However, the Ohio Supreme Court in a subsequent case made clear that the rationale of *Byrd* did not apply to an employee's sexual harassment of another employee over whom he or she had supervisory power. In *Kerans v. Porter Paint Co.*, 61 Ohio St.3d 486, 575 N.E.2d 428 (1991), the plaintiff alleged that her direct supervisor had sexually harassed her during the course of her employment. The court specifically rejected Porter Paint's reliance on *Byrd* and its argument that it could not be held liable because it did not hire the employee to harass female employees. *Id.* at 432.

> In determining whether to impose liability based on respondeat superior on an employer for the sexually harassing acts of one of its employees, federal courts have employed traditional agency principles. Specifically, they have held that where an employee is able to sexually harass another employee because of the authority or apparent authority vested in him by the employer, it may be said that the harasser's actions took place within the scope of his employment.

Id. (citations omitted). Where the harassment takes "place during working hours, at the office, and was carried out by someone with the authority to hire, fire, promote and discipline the plaintiff," it will normally fall within the employee's scope of employment. *Id.* (citation omitted). The *Kerans* court then adopted the above standard, previously applied by federal courts, and held that there was a genuine issue as to the harasser's supervisory powers and that dismissal of the employer was improper. *Id.*

In the instant case, Milam and Elmore had direct supervisory power over Mackey. Most of the alleged acts took place during working hours on the base. Moreover, Milam and Elmore were able to perpetrate the harassment because their employer, the Air Force, had placed them in a supervisory position. Therefore, they were acting within the scope of their employment.[2]

In arguing that Milam and Elmore were acting outside the scope of their employment, Mackey focuses on at least two events that do not precisely fit the above profile. First, she argues that Elmore's harassment of her at a local bar was outside the scope of employment because it occurred off base and after working hours. However, we find that this isolated incident does not take Elmore's actions, as a whole, outside the scope of his employment. He convinced Mackey to come to the bar because he said he wanted to discuss her resume. Thus, it is doubtful that he would have been able to "lure" her to

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[2] The dissent suggests that reliance on *Kerans* is misplaced and that this court should instead rely on *Osborne v. Lyles*, 63 Ohio St.3d 326, 587 N.E.2d 825, 829 (1992). In *Osborne*, which dealt with the liability of a police department for the actions of an off-duty officer who assaulted a civilian, the Ohio court stated that, "an employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business." *Id.* However, that quoted language was taken from *Byrd*, 565 N.E.2d at 588, which the Ohio Supreme Court rejected in cases of sexual harassment of an employee by her supervisor. *See Kerans*, 575 N.E.2d at 432.

the meeting had he not been in a supervisory position over her.

Mackey also argues that the unfavorable job recommendations given by the defendants after she left the Air Force take their actions outside the scope of her employment because they were no longer her supervisors. However, their opinions were solicited because they had been her supervisors. Therefore, their opinions were given only because the Air Force had placed them in positions of authority. The fact that Mackey was no longer on active duty is irrelevant to the determination.

---------- **Page 154 F.3d 652 follows** ----------

[6] We conclude that the individual defendants were acting within the scope of their employment when they allegedly harassed Mackey. Therefore, the United States should be substituted as the defendant in this action, and the matter should not be remanded to the Ohio state court. Under the *Feres* doctrine, "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 95 L.Ed. 152 (1950). Mackey's allegations go "directly to the 'management' of the military; [they call] into question basic choices about the discipline, supervision, and control of a serviceman ... and [are], therefore, [ ] allegation[s] about which we are prohibited from inquiring." *Skees v. United States*, 107 F.3d 421, 424 (6th Cir. 1997) (citing *United States v. Shearer*, 473 U.S. 52, 58, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985)) (internal quotations omitted). *See also Stubbs v. United States*, 744 F.2d 58 (8th Cir. 1984) (holding that a claim against the United States for a servicewoman's suicide allegedly caused by her drill sergeant's sexual harassment was barred by Feres).

REVERSED and REMANDED for action consistent with this opinion.

DISSENT

R. GUY COLE, JR., Circuit Judge, dissenting.

I respectfully dissent from the majority's opinion because I disagree with its reading of Ohio law and conclusion that the conduct alleged in this suit falls within the defendants' scope of employment. Therefore, I do not believe that the United States should be substituted as the defendant in this action.

The majority considers *Kerans v. Porter Paint Co.*, 61 Ohio St.3d 486, 575 N.E.2d 428 (1991), a departure of sorts from the general principles of Ohio law regarding scope of employment, and bases its conclusion in this case on only that one decision. In *Kerans*, the court concluded that a jury could find a store manager's alleged sexual harassment to be within the scope of his employment if the manager had supervisory authority over the plaintiff and used such authority to cause the plaintiff to feel compelled to endure his conduct in order to remain employed. *Id.* at 432. I disagree with the majority's conclusion that *Kerans* is dispositive of the issue presented in this case. The resolution of scope of employment questions varies from case to case; we are not bound by one decision's determination that summary judgment was not warranted in a particular factual circumstance.

Although the majority opinion sets out the basic facts of this case, I have included the district court's synopsis of the facts alleged in the complaint, as it presents a somewhat fuller picture of the conduct and circumstances

alleged. As taken from the district court's opinion, the factual scenario is as follows:

> After graduating from the University of Akron, Plaintiff, Dorothy Mackey, became a commissioned officer in the United States Air Force. In September 1991, Plaintiff was assigned as Squadron Section Commander at Wright-Patterson Air Force Base (Wright-Patterson) in Dayton, Ohio. In this position, Plaintiff reported to and interacted with the Defendants in this action, Colonel David W. Milam and Lt. Colonel Travis E. Elmore. As Squadron Section Commander, Plaintiff was responsible for the Weight Management Program (WMP) and the Cycle Ergometry Program (CEP), both designed to measure and ensure the physical fitness and readiness of military personnel.
>
> Defendant Colonel Milam, retired, served as Inspector General and Chief of Staff for the Aeronautical Systems Division of Wright-Patterson at the time the alleged incidents occurred. Defendant Lt. Colonel Elmore reported to Colonel Milam. His official title at the time of these incidents was Assistant Chief of Staff for the Aeronautical Systems Division and Assistant Inspector General. Both Defendants were Plaintiff's immediate supervisors.
>
> Plaintiff alleges various instances of sexual harassment against both Defendants while she served as Squadron Section Commander. These allegations include

charges of both verbal harassment and physical contact that, if true, constitute serious misconduct. Specifically, with regard to Colonel Milam, Plaintiff alleges that: (1) While Plaintiff was reporting to Colonel Milamin his office regarding the WMP checks, the Colonel would often close and lock the door behind Plaintiff; (2) During these briefings and on several occasions Colonel Milam would eye Plaintiff from head to toe and make suggestive remarks such as "This is what I prefer"; (3) Colonel Milam would invade Plaintiff's "intimate zone" by standing so close to her as to enable her to feel his breath on her face and neck; (4) Colonel Milam often touched Plaintiff by placing his hand on her hand or squeezing her arm while she briefed him on the WMP program.

Plaintiff's allegations regarding Lt. Colonel Elmore's conduct are even more severe. According to the Complaint, Lt. Colonel Elmore made it clear early on in the relationship that he was interested in Plaintiff's body. He appeared to have had a particular interest in Plaintiff's breasts, even going so far as to comment on one occasion that her erect nipples were "a natural reaction" from the cold. Lt. Colonel Elmore repeatedly made inquiries into Plaintiff's waist size, even taking the liberty of placing his hands around her waist on more than one

occasion. Elmore would often make an approving remark such as, "Very nice--very nice," if Plaintiff were wearing her skirted uniform, but Elmore allegedly lost interest if she were wearing the pants uniform. Plaintiff alleges that over time the Lt. Colonel's conduct became increasingly more physical. Elmore once began to massage the back of Plaintiff's neck after it had popped audibly in his presence. One another occasion, after Plaintiff had twisted her right knee and was treated by a physician, Lt. Colonel Elmore took the opportunity to examine the knee himself.

Finally, in a truly bizarre and disturbing event, Plaintiff alleges that Elmore began to replicate a quasi-pelvic exam on Plaintiff while in his office. Plaintiff mentioned to Elmore that she was not feeling well. Lt. Colonel Elmore allegedly got out of his chair, walked over to Plaintiff, and placed both of his hands on her stomach and pressed down. He began to move his hands down the front of her pants, with his thumbs up and fingers wrapped around her back. Elmore continued to move his hands downward, pressing in on Plaintiff's abdomen despite her protests. When the Lt. Colonel got to Plaintiff's pubic area, Elmore said that she should see a physician.

All of Plaintiff's allegations, with the exception of one incident in August 1992, occurred on the military base during working

> hours. The August incident involved Elmore allegedly calling Plaintiff at her apartment around 10:00 p.m. from an off-base night spot and insisting that she meet him there. Plaintiff agreed to meet Lt. Colonel Elmore after he mentioned that he could review her resume which he had with him. When Plaintiff arrived, Elmore was alone and had placed an order for food. Elmore asked about her neck and back, and he began rubbing his hand up and down her back. Plaintiff claims that on several occasions, his hand dropped below her waist. After refusing Lt. Colonel Elmore's request to dance, Plaintiff claims she attempted to leave, but Elmore physically prevented her from entering her car by leaning against the driver's side door. Thirty minutes later, Elmore finally relinquished, and allowed Plaintiff to drive home alone.

Mackey v. Milam, No. C-3-96-140, at 1-4 (S.D.Ohio Dec. 11, 1996).

The majority reasons that Milam and Elmore's actions were within the scope of their employment simply because they had direct supervisory power over Mackey and because most of the incidents occurred during working hours. This reasoning is not supported by Ohio law. In *Kerans,* the decision upon which the majority relies, the Ohio Supreme Court did not hold that a supervisor's sexual harassment of an employee is per se within a supervisor's scope of employment by virtue of a supervisor's ability to sexually harass. Rather, the court held that if a supervisor used his authority to cause the subordinate employee to feel compelled to endure his

advances in order to keep her job, then a jury could reasonably find that the supervisor acted within the scope of his employment. *Kerans*, 575 N.E.2d at 432.[1] The *Kerans* court went on to state that "[e]ven if [the supervisor's] activities took place outside the scope of employment, summary judgment against appellants' claims would not be proper," noting that the employer may be liable for failing to take appropriate action if the employer knows or had reason to know that its employee posed a risk of harm to other employees. 575 N.E.2d at 432. The *Kerans* decision has been characterized as holding that "the torts of co-workers predicated upon sexual harassment are within the scope of employment if the employer was negligent in not preventing that malfeasance." *Baab v. AMR Services Corp.*, 811 F.Supp. 1246, 1267 (N.D.Ohio 1993). Thus, the Kerans court did not rely entirely upon the issue of scope of employment to conclude that summary judgment was not warranted in that case.

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[1] The majority represents that the *Kerans* Court held that when the harassment takes place during working hours, at the office and by someone with the authority to hire, fire, promote and discipline the plaintiff, "it will normally fall within the employee's scope of employment." *See* slip op. at p. 650. The *Kerans* Court did not make that statement. Rather, it summarized a federal district court's decision in which there were such circumstances. *See Kerans, 575 N.E.2d at 432* (summarizing holding of *Shrout v. Black Clawson Co.*, 689 F.Supp. 774 (S.D.Ohio 1988)).

I do not believe that *Kerans*, or Ohio law in general, suggests that all an employee's acts are within the scope of employment simply because he is in a supervisory position which enables him to engage in tortious conduct. To say such leads to the conclusion that innumerable tortious acts committed upon lower-ranking employees by supervisors will be considered within the scope of employment. In my mind, this reasoning and its inevitable conclusion defy common sense. The fact that Elmore and Milam would not have been able to commit the alleged conduct absent their positions as supervisors avoids the question presented. It goes without saying that the conduct would not have occurred if Mackey had not had an association with the defendants by virtue of her employment. Our task is to determine whether these supervisors were acting within their scope of employment when they engaged in the alleged conduct.

In addition, the Ohio Supreme Court has more recently restated its position regarding whether an employee's conduct falls within the scope of his employment, albeit not in the context in which a supervisor was the tort-feasor. *See Osborne v. Lyles*, 63 Ohio St.3d 326, 587 N.E.2d 825, 829 (1992). In *Osborne*, the Ohio Supreme Court explained that in order for an employee's conduct to be considered within the scope of his employment, "the behavior giving rise to the tort must be 'calculated to facilitate or promote the business for which the servant was employed....'" 587 N.E.2d at 829 (citations omitted).

> In general, an intentional and willful attack committed by an agent or employee, to vent his own spleen or malevolence against the injured person,is a clear departure from his employment.... Stated otherwise, an employer

> is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business.

Id. (citations and quotations omitted); *see also Henson v. National Aeronautics and Space Administration*, 14 F.3d 1143, 1147 (6th Cir. 1994) (stating that under Ohio law, "an employee is not acting within the scope of employment if its acts are self-serving and in no way facilitate or promote business"), *amended on rehearing*, 23 F.3d 990 (6th Cir. 1994).

Clearly, the conduct alleged here was intended to neither facilitate nor promote the business of the United States Air Force. The Air Force does not promote, facilitate or condone sexual harassment; in fact, it has promulgated regulations prohibiting such conduct. In Osborne, the Ohio Supreme Court offered further guidance, drawing on its long-established precedent. "'When an employee diverts from the straight and narrow performance of his task, the diversion is not an abandonment of his responsibility and service to his employer unless his act is *so divergent that its very character severs the relationship of employer and employee.*'" *Id.* at 829 (citations omitted) (emphasis added);

---------- **Page 154 F.3d 655. follows** ----------

Mumford v. Interplast, Inc., 119 Ohio App.3d 724, 696 N.E.2d 259, 265 (1997) (stating that "an employee is acting outside the scope of employment where the act has no relationship to the employer's business or is so divergent that its very character severs the employer-employee relationship"). It is clear to me that the nature of the conduct alleged here is so divergent from the defendants' legitimate duties and work activities that it severed the employer-employee relationship between the Air Force and the defendants.

In sum, I believe that the majority improperly extended the holding of *Kerans* and disregarded other Ohio decisions relevant to determining the issue of whether an employee's conduct falls within the scope of his employment. In my view, the majority opinion thus misconstrues Ohio law. The *Kerans* decision, upon which the majority relies, supports the imposition of liability against a negligent employer by considering the employer's potential liability for an employee's actions. Here, the majority's application of *Kerans* provides for the opposite result. By considering the defendants' actions to fall within the scope of their employment, the majority enables the defendants, as well as their employer--the United States--to escape liability because the United States is immune from suit. Plaintiff is thus left without a remedy for the egregious actions of the defendants. I do not believe that Ohio law can be construed to permit such an inequitable result. In my opinion, the defendants' conduct was plainly a personal deviation and not within the scope of their employment as defined by Ohio law. As a result, the United States should not be substituted as the defendant in this action. I would therefore affirm the district court's reinstatement of Milam and Elmore as defendants in this action.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Dorothy Mackey,	:	CASE NO. C-3-96-140
Plaintiff,	:	
vs.	:	Judge Susan J. Dlott
David W. Milam, et al.,	:	
Defendants.	:	**ORDER**

This matter is currently before the Court on Defendant's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. FACTUAL BACKGROUND

After graduating from the University of Akron, Plaintiff, Dorothy Mackey, became a commissioned officer in the United States Air Force. In September 1991, Plaintiff was assigned as Squadron Section Commander at Wright-Patterson Air Force Base (Wright-Patterson) in Dayton, Ohio. In this position, Plaintiff reported to and interacted with the Defendants in this action, Colonel David W. Milam and Lt. Colonel Travis E. Elmore. As Squadron Section Commander, Plaintiff was responsible for the Weight Management Program (WMP) and the Cycle Ergometry Program (CEP), both designed to measure and ensure the physical fitness and readiness of military personnel.

Defendant Colonel Milam, retired, served as Inspector General and Chief of Staff for the Aeronautical Systems Division of Wright-Patterson at the time the

alleged incidents occurred. Defendant Lt. Colonel Elmore reported to Colonel Milam. His official title at the time of these incidents was Assistant Chief of Staff for the Aeronautical Systems Division and Assistant Inspector General. Both Defendants were Plaintiff's immediate supervisors. Plaintiff alleges various instances of sexual harassment against both Defendants while she served as Squadron Section Commander. These allegations include charges of both verbal harassment and physical contact that, if true, constitute serious misconduct. Specifically, with regard to Colonel Milam, Plaintiff alleges that: (1) While Plaintiff was reporting to Colonel Milam in his office regarding the WMP checks, the Colonel would often close and lock the door behind Plaintiff; (2) During these briefings and on several occasions Colonel Milam would eye Plaintiff from head to toe and make suggestive remarks such as "This is what I prefer"; (3) Colonel Milam would invade Plaintiff's "intimate zone" by standing so close to her as to enable her to feel his breath on her face and neck; (4) Colonel Milam often touched Plaintiff by placing his hand on her hand or squeezing her arm while she briefed him on the WMP program.

Plaintiff's allegations regarding Lt. Colonel Elmore's conduct are even more severe. According to the Complaint, Lt. Colonel Elmore made it clear early on in the relationship that he was interested in Plaintiff's body. He appeared to have had a particular interest in Plaintiff's breasts, even going so far as to comment on one occasion that her erect nipples were "a natural reaction" from the cold. Lt. Colonel Elmore repeatedly made inquiries into Plaintiff's waist size, even taking the liberty of placing his hands around her waist on more

than one occasion. Elmore would often make an approving remark such as, "Very nice -- very nice," if Plaintiff were wearing her skirted uniform, but Elmore allegedly lost interest if she were wearing the pants uniform. Plaintiff alleges that over time the Lt. Colonel's conduct became increasingly more physical. Elmore once began to massage the back of Plaintiff's neck after it had popped audibly in his presence. On another occasion, after Plaintiff had twisted her right knee and was treated by a physician, Lt. Colonel Elmore took the opportunity to examine the knee himself.

Finally, in a truly bizarre and disturbing event, Plaintiff alleges that Elmore began to replicate a quasi-pelvic exam on Plaintiff while in his office. Plaintiff mentioned to Elmore that she was not feeling well. Lt. Colonel Elmore allegedly got out of his chair, walked over to Plaintiff, and placed both of his hands on her stomach and pressed down. He began to move his hands down the front of her pants, with his thumbs up and fingers wrapped around her back. Elmore continued to move his hands downward, pressing in on Plaintiff's abdomen despite her protests. When the Lt. Colonel got to Plaintiff's pubic area, Elmore said that she should see a physician.

All of Plaintiff's allegations, with the exception of one incident in August 1992, occurred on the military base during working hours. The August incident involved Elmore allegedly calling Plaintiff at her apartment around 10:00 p.m. from an off-base night spot and insisting that she meet him there. Plaintiff agreed to meet Lt. Colonel Elmore after he mentioned that he could review her resume which he had with him. When Plaintiff arrived, Elmore was alone and had placed an

order for food. Elmore asked about her neck and back, and he began rubbing his hand up and down her back. Plaintiff claims that on several occasions, his hand dropped below her waist. After refusing Lt. Colonel Elmore's request to dance, Plaintiff claims she attempted to leave, but Elmore physically prevented her from entering her car by leaning against the driver's side door. Thirty minutes later, Elmore finally relinquished, and allowed Plaintiff to drive home alone.

As a consequence of these alleged incidents, Plaintiff claims that she was so traumatized as to make any prospect of working at the base impossible. Plaintiff claims to have sought the help and support of many, but to no avail. Plaintiff finally submitted an application for the early separation program in May of 1992. Plaintiff's final day of service in the United States Air Force was September 29, 1992.

Plaintiff filed a complaint against Colonel Milam and Lt. Colonel Elmore in their individual capacities in the Montgomery County Court of Common Pleas on December 5, 1994. The case proceeded in the state court before Judge Gilvary for 16 months until the United States Attorney for the Southern District of Ohio on April 30, 1996, certified that Colonel Milam and Lt. Colonel Elmore were acting within the scope of their employment and, consequently, the United States was substituted as Defendant. The United States, as Defendant, filed a notice of removal with this court on May 1, 1996, almost a year and a half after Plaintiff originally filed her Complaint in state court. On May 31, 1996 the Plaintiff filed a motion to move this Court to remand the present action to the Montgomery County Court of Common Pleas. The United States, on July 12,

1996, filed its Motion to Dismiss Plaintiff's Complaint. Plaintiff prays for relief on the grounds of intentional infliction of emotional distress, common law sexual harassment, assault and battery, tortious interference with contractual relations, tortious interference with prospective business advantage, sex discrimination (hostile environment), and wrongful separation (discharge).

II. Discussion

A. Legal Standard of Review: Scope Certification

It is well established that when a suit is filed against a federal employee based upon a tort committed within the scope of his employment the civil action against the employee is deemed to be against the United States under the Federal Tort Claims Act (hereinafter "the Westfall Act") and the United States is substituted by operation of law as the sole defendant with respect to any state law claims. 28 U.S.C. § 2679(d)(1)(2).

The Attorney General has delegated to the United States Attorney the authority to determine when federal employees are acting "within the scope of their employment" for purposes of the Westfall Act. 28 C.F.R. § 15.3 (1989). On April 30, 1996, the United States Attorney for the Southern District of Ohio certified that both Colonel Milam and Lt. Colonel Elmore were acting within the scope of their employment at the time the incidents giving rise to this suit occurred. The United States was thus substituted as the true defendant, and this action was removed to federal court. Defendants then filed their motion to dismiss.

Just last term the Supreme Court made clear that a U.S. Attorney's certification regarding scope of employment does not conclusively decide the matter. Martinez

v. Lamagno, 115 S.Ct. 2227, 2236 (1995). The Court refused to render the federal district courts powerless to grant anything more than mere mechanical judgments in support of the United States Attorney's certification. In Martinez the plaintiffs, citizens of Colombia, suffered physical injuries and property damage when an allegedly intoxicated United States DEA Agent collided into plaintiffs' car in Barranquilla, Columbia. Id. at 2229. The United States Attorney certified that the agent was acting within the scope of his employment at the time of the accident. Due to an exception to the Federal Tort Claims Act, the United States would be immune to suit were it substituted as defendant for the DEA agent. Id. at 2230. With this in mind, the Court held that:

> ". . . the Attorney General's certification that a federal employee was acting within scope of his employment . . . does not conclusively establish as correct the substitution of the United States as defendant in place of the employee." Id. at 2236.

However, although federal courts are no longer viewed as "rubber stamps" of executive actions, the Sixth Circuit has held that a U. S. Attorney's certification serves as prima facie evidence that the employee was acting within the scope of his employment. Coleman v. United States, 91 F.3d 820, 823 (6th Cir. 1996). Whether an employee was acting within the scope of his employment is a question of law, not fact, made in accordance with the law of the state where the conduct occurred. RMI Titanium Co. v. Westinghouse Electric Corp., 78 F.3d 1125, 1144 (6th Cir. 1996). Hence, under the Westfall Act, the Court must look to Ohio state law to

determine whether Colonel Milam and Lt. Colonel Elmore's actions fell within the scope of their employment.

B. Ohio Scope of Employment Law

It is well established in Ohio that under the doctrine of respondeat superior an employer will be held liable when an employee commits a tort while he is acting within the scope of his employment. Byrd v. Faber, 57 Ohio St.3d 56, 58 (1990). Where the tort alleged is intentional, the test is whether the behavior giving rise to the tort is "calculated to facilitate or promote the business for which the servant was employed." Taylor v. Doctor's Hosp., 21 Ohio App.3d 154, 156-57 (1985). As outlined below, Ohio courts have had ample opportunity to address the issue of what actions fall within the scope of one's employment. In general, scope of employment is a fact specific inquiry, with the court reaching differing conclusions depending upon the identity and practices of the defendant, as well as the particular actions alleged.

The Ohio Supreme Court has held that an employer will not be liable for independent and self-serving acts of his employees which in no way facilitate or promote the employer's business. Byrd, 57 Ohio St.3d at 59. In Byrd, the plaintiffs requested that their church reverend provide their family with needed marital and personal counseling. During the course of this counseling, Reverend Faber allegedly forced Mrs. Byrd to engage in unwanted sexual activity with him. The Byrds brought action against Reverend Faber and his employer, the Ohio Conference of Seventh-Day Adventists, for inter alia, intentional infliction of emotional distress and nonconsensual sexual conduct. Id. at 586.

Despite the fact that counseling falls within the scope of a pastor's clerical duties, the Supreme Court held that Reverend Faber acted outside the scope of his employment by engaging in nonconsensual sexual conduct with the plaintiff. In upholding the dismissal of the plaintiffs' claim against the Church, the Supreme Court of Ohio focused on the nature of the defendant-employer: "The Seventh-Day Adventist organization in no way promotes or advocates nonconsensual sexual conduct between pastors and parishioners." Id. at 60-61. In other words, the church could not be held liable for the independent and self-serving acts of the pastor which in no way facilitated or promoted the beliefs of the Seventh-day Adventist organization. The Court was careful to focus on both the actions complained of and the identity of the defendant-employer. The Court noted that the church did not hire the pastor to rape, seduce, or otherwise physically assault members of the congregation. Id. at 60. The Court concluded that the Church, as an institution, could not be held liable for such coercive and harassing behavior. Id.

Defendants characterize Byrd as an aberration of Ohio law and instead rely on an opinion from this district, Crithfield v. Monsanto Co., 844 F.Supp[.] 371 (S.D. Ohio, W.D. 1994). In Crithfield, the plaintiff alleged a pattern of harassment by a defendant-co-worker which included exposing himself to her, unwelcomed sexual advances, requests for sexual favors, nonconsensual sexual fondling, and displays of sexually explicit photographs. Id. at 372-373. The court rejected the employer's argument that it could not be held liable for the independent and self-serving acts of its employee. In an effort to distinguish Byrd, the Honorable Judge

Speigel noted that the Byrd analysis revolves around the fact that the defendant was a church, "raising among other problems First Amendment questions." Id. at 374 (emphasis added).

Although the Court agrees with the Defendants that Byrd did not create a per se rule that sexual harassment always falls outside the scope of a supervisor's employment, the Court cannot conclude that Byrd is an aberration. Rather, the two cases illustrate that Ohio courts are sensitive to the identity of the defendant-employer and the context in which the allegedly harassing behavior arose. As Crithfield readily points out, churches can be distinguished from private employers. Most significantly, the harassing conduct displayed in Byrd is antithetical to the doctrines, teachings, and raison d'etre of a religious institution.[1]

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[1] Defendants rely on Davis v. Black, 70 Ohio App.3d 359, 591 N.W.2d 11 (1991) where a parish secretary was allegedly harassed by the church's pastor. The trial court found that the pastor could not have been acting within the scope of his employment since sexual harassment fell outside the duties of a pastor. The Court of Appeals reversed and distinguished Byrd along employment and religious lines:

> This case involves the church as an employer and its responsibility for sexual harassment by the person to whom it delegated supervisory (and hiring) authority. Byrd involves the strictly religious aspects of the church and its relationship to parishioners (not employees) and its pastor. Id. at 365.

When the Ohio Court of Appeals visited the scope of employment issue in the context of sexual harassment, it was found to be of considerable significance that the defendant-employer was the State of Ohio. Szydlowski v. Ohio Department of Rehabilitation and Correction, 79 Ohio App.3d 303, 305 (1992). In Szydlowski, plaintiffs were female inmates at an Ohio correctional facility who alleged that they engaged in sexual activity with a certain state employed psychological aide hired to provide counseling to inmates. The Court of Appeals found Byrd directly on point and indistinguishable from the facts before it. Id. at 305. "Like the church, the state does not promote or advocate sexual conduct, much less nonconsensual sexual conduct, between its employees and inmates at penal institutions, nor did it hire the psychological aide to engage in any type of sexual contact or conduct with female inmates . . ." Id. at 306.

Finally, the Sixth Circuit has recently had the opportunity to consider the issue of scope certification under Ohio law, although not in the context of alleged

(continued)

This Court notes only that Davis deals with the Church in the context of an employer. Not only is the identity of the employer a significant consideration in the court's analysis, but so are the practices and actions of that employer. Davis illustrates that the context in which the alleged sexual harassment occurred is as significant as the identity of the defendant-employer. The church in Davis more closely resembled a private entity employer than the church as an institution. The relationship between employer and pastor, and pastor and employee was sufficient enough to impute liability on the church.

sexual harassment. Nonetheless, the Sixth Circuit's insight proves valuable to the case at hand. In RMI Titanium Co. v. Westinghouse Electric Corp., supra, RMI, a federal subcontractor, brought suit against the Department of Energy (DOE) and one of its employees for wrongful termination of a government contract. RMI, 78 F.3d at 1125. The Sixth Circuit upheld the Attorney General's certification that the DOE employee was acting within the scope of his employment at the time of the complained of actions. More importantly for purposes of the instant case, the Court, in a final footnote, commented on the type of scope certification cases relied upon by RMI:

> The cases relied upon by RMI all deal with sexual and racial harassment by supervisors of employee-plaintiffs (and one case involving the sexual activities of a priest with a parishioner). Not surprisingly, in these cases, the courts held that the employee-defendants were not acting within the scope of their employment. Id. at 1144.

The Sixth Circuit recognized that when a plaintiff-employee alleges sexual or racial harassment, the court should be more willing to find the defendant to be acting outside the scope of his employment. This would seem especially appropriate when the alleged sexual harassment occurs in the context of a church or military setting.

C. Analysis

Relying on the reasoning of the cases mentioned above, the Court believes that the courts of Ohio would hold that when a commanding military officer sexually harasses a subordinate while carrying out military duties, that officer's actions will be considered outside the scope

of his employment under respondeat superior principles, and the United States may not be substituted as defendant for the officer under the Federal Tort Claims Act. The Military, like the Church and the State, is an employer wholly distinguishable from the private entity employer. The United States Air Force, or any other branch of the Armed Services for that matter, in no way promotes, facilitates, or condones sexual harassment in any form. The United States Air Force has set forth extensive regulations that prohibit exactly the kind of conduct Plaintiff alleges against Defendants here. Additionally, in light of the recent high profile efforts of the military to deal with the problem of sexual harassment between commanding officers and subordinates in the military, it could hardly be said that the United States Armed Services encourages or advocates that its members engage in sexual discrimination or harassing conduct.

As has been discussed, the identity and practices of the defendant-employer play a prominent role in a court's determination of whether the employee was acting within the scope of his or her employment. Although Byrd involved a religious institution, the Ohio Court of Appeals found that "there is no reason to apply a lesser standard to a claim against the state . . ." Id. at 306. The State in Szydlowski was likened to the Church and distinguished from the private entity employer. Additionally, the Sixth Circuit has noted that a court should be more sensitive in the area of scope of employment when a plaintiff's complaint alleges instances of sexual harassment. Obviously Byrd does not stand alone on its facts, and its holding can be extended to the Military. The Military is a system based, to a large

degree, upon a rigid hierarchi[c]al command structure. Military superiors tempted to exploit the vulnerability of their subordinates should not believe that their sexually harassing conduct will be protected under the auspices of the Federal Tort Claims Act.

On the facts alleged in this case, the Court finds that Defendants' conduct fell outside the scope of their employment at the time the incidents giving rise to this suit occurred and that the United States may not be substituted as defendant in this action. Plaintiff has alleged numerous instances of sexually harassing behavior and conduct which contravene outlined military procedure. Although all but one of the alleged instances of harassment and coercion occurred while Colonel Milam and Lt. Colonel Elmore were on duty, in no way can their conduct be characterized as calculated to facilitate or promote the business of the United States government. The Defendants' actions can only be seen as independent and self -serving. Plaintiff alleges several counts of sexual harassment including sexually charged comments, lascivious stares, inappropriate and unwanted touching, locking of office doors at private meetings, and encounters where Plaintiff's "intimate zone" was invaded. On these facts, the scope of employment test in Ohio fails to be satisfied. Because the United States Air Force did not hire Defendants to sexually harass female subordinates and since such behavior is not condoned by the Defendants' employer, the Defendants' alleged actions did not occur within the scope of their employment. This suit must now proceed against Colonel Milam and Lt. Colonel Elmore in their individual capacity and liability may not be imposed upon the United States government as the substituted defendant.

D. Status of Federal Court Jurisdiction

This Court must now decide whether to rule on Defendants' Rule 12(b)(6) motion and let this action proceed or to remand the case back to state court for final determination. Defendants argue that this case should not be remanded to state court, but should proceed to final judgment before this Court. Plaintiff asserts that a case should be remanded to state court when, contrary to the Attorney General's certification, the actions of individual defendants have been found not to be within the scope of their employment.

Defendants rely heavily on Part IV of the recent U.S. Supreme Court case of Martinez v. Lamagno, supra, in support for their proposition that no "grave Article III problem" is raised when a court determines that the Defendants were not acting within the scope of their employment. Martinez, 115 S.Ct. at 2236. "Whether the employee was acting within the scope of his federal employment is a significant federal question." Id. Defendants, however, fail to mention that in Martinez the suit was originally brought in federal court and was not removed from state court. Here, Plaintiff originally filed her complaint in a state court which has already expended a considerable amount of time and resources on this case. Over a year and a half elapsed between the filing of Plaintiff's Complaint and the substitution of the United States as defendant. Judge Gilvary has ruled on numerous motions and has presided over an in-chambers pretrial scheduling conference resulting in the issuance of a Final Pretrial Order and an Amended Pretrial Order. Unlike in Martinez, the state courts here have a considerable interest in this litigation.

Furthermore, Part IV of Martinez is not controlling on this court. In an opinion by a markedly divided Court, Justice O'Connor, the deciding vote, refused to join Part IV of the decision on the grounds that the question was not properly presented before the Court. This left an evenly divided Court with the still undecided issue of what to do in cases where the federal district court overturns the Attorney General's scope of employment certification.

The Sixth Circuit has yet to rule on whether a case should be remanded to state court or be allowed to proceed when the district court finds that the Attorney General's scope certification is incorrect and resubstitutes the originally named defendant. See, Coleman v. United States, 91 F.3d 820, 822 n.2 (6th Cir. 1996). A split among the circuits exists on the issue, and decisions favoring remand include: Nasuti v. Scannell, 906 F.2d 802, 814 n.17 (1st Cir. 1990) and Haddon v. United States, 68 F.3d 1420, 1426 (D.C. Cir. 1995). However, Garcia v. United States, 88 F.3d 318 (5th Cir. 1996) and Aliota v. Graham, 984 F.2d 1350, 1356 (3d Cir.), cert. denied, 510 U.S. 817, 114 S.Ct. 68, 126 L.Ed.2d 37 (1993), both reach the contrary result and find a sufficient basis for federal court jurisdiction. The Court believes that the cases supporting remand where the federal district court finds the original defendants to have been acting outside the scope of their employment to be the more well reasoned. Therefore, Plaintiff's motion to remand must be granted and the case remanded to state court.

E. Conclusion

Based upon a full review of both parties' briefs, and for the reasons stated above, the Court finds that the

Defendants did not act within the scope of their employment during the incidents alleged in Plaintiff's complaint. Therefore, Defendants' Motion to Dismiss is remanded to the state court.

IT IS SO ORDERED.

s/Susan J. Dlott
Susan J. Dlott
United States District Judge

December 10, 1996

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DOROTHY MACKEY,	:
Plaintiff,	: Case No. C-3-96-140
	:
v.	:District Judge Susan J. Dlott
	:
DAVID W. MILAM,	: **ORDER GRANTING IN**
et al.,	: **PART AND DENYING**
	: **IN PART DEFENDANT'S**
Defendants.	: **MOTION FOR**
	: **RECONSIDERATION**

This matter is before the Court on Defendant's Motion for Reconsideration (doc. #18) of the Court's December 11, 1996 Order (doc. #16). For reasons more fully set forth below, the Court hereby GRANTS IN PART AND DENIES IN PART the Defendant's Motion.

This matter is also before the Court on Defendant's Motion to Stay Proceedings (doc. #19). In light of this Court's decision today on the Defendant's Motion for Reconsideration, the Defendant's Motion to Stay Proceedings is hereby DENIED AS MOOT.

I. BACKGROUND

The factual background of this case is set forth fully in this Court's Order of December 11 (doc. #16).

In the December 11 Order, the Court found that, assuming the facts in the complaint were true, the named

Defendants, Colonels Milam and Elmore, were not acting within the scope of their employment when they engaged in sexually harassing behaviors toward their subordinate, the Plaintiff, Dorothy Mackey. On January 31, 1991, the Defendant United States of America,[1] filed a Motion for Reconsideration. Specifically, the Defendant sets forth five grounds upon which judgment should be amended:

1. The Order fails to decide whether Plaintiff's case is barred by the doctrine of intramilitary immunity.
2. The Order improperly applies Ohio law in deciding whether the Colonels were acting within the scope of their employment.

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[1] Initially, the Court notes that the United States may not be a party to this action at this time. Both parties seem to contend that the Court's December 11 Order did not resubstitute Colonels Milam and Elmore as Defendants. However, the Court's December 11 Order specifically states that "[t]his suit must now proceed against Colonel Milam and Lt. Colonel Elmore in their individual capacity and liability may not be imposed upon the United States government as the substituted defendant" (doc. #16 at 17). By this language, the Court resubstituted the Colonels as Defendants in this action.

However, because the Plaintiff does not seriously contest the motion on the basis of the status of the United States as a nonparty, and because the effect of this Order is to reinstate the United States as a party, the Court will allow the filing of the Motion to Reconsider by the United States.

3. The Order fails to provide a hearing on the scope of employment issue, as requested by the United States.

4. The Court failed to Order the resubstitution of the Colonels as Defendants upon finding that they were acting outside the scope of their employment.

5. The Order improperly remands the case to state court.

Each argument will be addressed in turn.

II. ANALYSIS

A. The Doctrine of Intramilitary Immunity

The doctrine of intramilitary immunity was not addressed in the Court's December 11 Order because the doctrine is not dispositive. The Court reviewed Montgomery County Common Pleas Court Judge James J. Gilvary's decision on this issue and found the reasoning persuasive.

Judge Gilvary found the so-called Feres doctrine to be inapplicable to this case for many of the same reasons that this Court found the Colonels' alleged acts not to be within the scope of their employment. Thus, the Court adopts the reasoning of the Decision, Entry and Order Overruling in Part and Sustaining in Part Defendants' Motion to Dismiss, Case No. 94-4249.[2]

B. Application of Ohio Law

This point needs little elaboration. The Court's December 11 Order cites RMI Titanium Co. v. Westinghouse Electric Corp., 78 F.3d 1125, 1143 (6th Cir. 1996),

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[2] The copy filed with the Court does not bear a date or docket number.

for the proposition that Ohio law governs in the determination of whether the Colonels were acting within the scope of their employment. A review of this cited authority reveals that this proposition is explicitly stated by the Sixth Circuit in RMI Titanium, and no other authority cited in the United States' Motion compels the Court to find otherwise.

C. Evidentiary Hearing

The United States next contends that it conditionally requested an evidentiary hearing on the issue of whether the Colonels acted within the scope of their employment. The Plaintiff argues that the United States agreed in a pretrial conference that no evidentiary hearing was necessary to determine the scope of employment issue (doc. #20 p.5) and that the Court should accept as true the allegations contained in the complaint for the purposes of the motion to dismiss. In its initial Order, the Court's recollection mirrored that of the Plaintiff's and therefore the Court did not order an evidentiary hearing on the scope of employment issue.

However, an examination of the transcript from the pretrial conference reveals that the United States only conditionally agreed to accept as true the allegations contained in the Plaintiff's complaint. If the Court could find that the Colonels were acting within the scope of employment even assuming as true the allegations contained in the complaint, then the United States was satisfied to forego its right to an evidentiary hearing. If, however, the Court were to find that the Colonels were not acting within the scope of their employment, the United States would ask for an evidentiary hearing on the

issue.[3]

Upon reconsideration, the Court finds that the United States requested an evidentiary hearing if the Court concluded that the Colonels were acting outside the scope of their employment, and the Court holds that the United States is entitled to an evidentiary hearing on this issue. Hueton v. Anderson, 75 F.3d 357, 361 (8th Cir. 1996) (finding that where Westfall Act scope of employment issue is disputed, the district court must conduct an evidentiary hearing to determine all facts relevant to the immunity question); Arthur v. United States, 45 F.3d 292, 296 (9th Cir. 1995) (finding that a district court reviewing Westfall Act certification must identify and resolve any disputed issues of fact necessary to its determination of the scope of employment issue); Kimbro v. Velten, 30 F.3d 1501, 1508 (D.C. Cir. 1994) (finding that, where necessary, the district court must hold an evidentiary hearing to determine scope of employment issue), cert. denied, 115 S.Ct. 2584 (1995);

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[3] Counsel for the United States stated the following:

> [B]ut I think to a certain extent, if you decide on the facts that the plaintiff presented that they were acting outside the scope, then the United States would request an evidentiary hearing to determine what actually happened, realizing that, in effect, [the evidentiary hearing] is going to be the whole nine yards. It's going to be basically the trial.

Both counsel for the Plaintiff and counsel for Colonel Milam indicated understanding of the United States' statement in their own subsequent statements.

Melo v. Hafer, 13 F.3d 736, 747 (3d Cir. 1994) (finding that if Westfall Act certification is based on a different understanding of the facts than that contained in the complaint, the plaintiff should be allowed discovery and an evidentiary hearing may be required); Wood v. United States, 995 F.2d 1122, 1133 (1st Cir. 1993) (finding that where employee denied alleged incidents ever occurred, district court must hold an evidentiary hearing to decide whether the incidents occurred.).[4]

While the Court is not inclined to reconsider the merits of its determination of the scope of employment at issue in this case, the Court is inclined to give consideration to the determination of the truth of the factual allegations set forth in the Plaintiff's complaint upon which its determination of the scope of employment issue was based. Upon conclusion of the evidentiary hearing, the Court will make findings of fact and will apply those

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[4] The Sixth Circuit authority on the requirement of an evidentiary hearing on the scope of employment issue does not directly address whether an evidentiary hearing is required when the district court determines that the employee acted outside the scope of his or her employment. See RMI Titanium, 78 F.3d at 1144 (no hearing is necessary if the district court finds that the employee acted within the scope of employment). However, the Court can find no instance in which contested facts were the basis for a finding by the district court that an employee acted outside the scope of employment and its own research leads to the inevitable conclusion that an evidentiary hearing is required in this case if requested by the United States.

facts to the rules of law set forth in its December 11 Order. If the Plaintiff proves the allegations contained in her complaint, then the Colonels will be resubstituted as Defendants and the case will be remanded to state court.

Accordingly, the Court hereby **VACATES** that part of its December 11 Order remanding the case to state court.

D. Order of Resubstitution of Colonels as Defendants

Initially, the Court notes that, contrary to what the Defendant alleges in its Motion, the Court did order the resubstitution of the Colonels as Defendants. The Court's December 11 Order specifically states that "[t]his suit must now proceed against Colonel Milam and Lt. Colonel Elmore in their individual capacity and liability may not be imposed upon the United States government as the substituted defendant." (doc. #16 at 17). By this language, the Court resubstituted the Colonels as Defendants in this action.

However, at this time, the Court hereby **VACATES** that part of its decision of December 11 ordering the resubstitution of the Colonels as Defendants pending discovery by the Plaintiff and the United States, and pending the evidentiary hearing ordered above.

E. Remand to State Court

The Court agrees that remand to state court prior to the Court's findings pursuant to the evidentiary hearing ordered above is inappropriate. At this time, the Court hereby **VACATES** that part of its decision of December 11 ordering remand of the action to state court.

III. CONCLUSION

For the reasons set forth and in the manner outlined above, the Court hereby **DENIES IN PART**

AND GRANTS IN PART Defendant's Motion for Reconsideration. In light of the Court's Order regarding the Defendant's Motion for Reconsideration, the Court hereby **DENIES AS MOOT** the Defendant's Motion to Stay Proceedings.

The parties will be contacted to arrange a scheduling conference to set deadlines for discovery in this matter and to set a date for the evidentiary hearing.

IT IS SO ORDERED.

s/Susan J. Dlott
Susan J. Dlott
United States District Judge

Date: 5/21/97

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
KENNETH J. MURPHY
CLERK
98 APR 22 PM12:55
U.S. DISTRICT COURT
SOUTHERN DIST OHIO
WEST DIV CINCINNATI

Dorothy Mackey, :
705 Villa Avenue
Akron, Ohio 44310 :

Plaintiff, :

vs. : CIVIL CASE NO. C-3-96-140

David W. Milam, Judge Susan J. Dlott
Travis Elmore,
United States of America :

Defendants. :

ORDER CERTIFYING INTERLOCUTORY DECISION FOR APPELLATE REVIEW

Upon Motion of the United States of America, David Milam, and Travis Elmore, Defendants, for Certification pursuant to 28 U.S.C. §1292(b) of the following issue in its May 27, 1997 Order:

1. Whether under Ohio law, a supervisor who engages in sexual harassment of a subordinate employee is acting within the scope of his employment.

this Court finds that its order denying Defendant's Motion to Dismiss, deciding that under Ohio law, a supervisor who engages in sexual harassment of a subordinate employee is not acting within the scope of his employment, does involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

WHEREFORE, pursuant to 28 U.S.C. §1292(b) this Court hereby certifies the following question presented by this Court's Order entered May 27, 1997, involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation:

> Whether the defendant Air Force officers were acting within the scope of their employment under Ohio law when they allegedly engaged in sexual harassment of the Plaintiff, an Air Force officer who worked for them.

IT IS SO ORDERED.

s/Susan J. Dlott
SUSAN J. DLOTT
UNITED STATES DISTRICT JUDGE

APPENDIX E

97-3859

FILED
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT OCT 27 1998
LEONARD GREEN, Clerk

DOROTHY MACKEY, Plaintiff-Appellee,	)	
v.	)	ORDER
DAVID W. MILAM, ET AL., Defendants-Appellants.	)	

BEFORE: KRUPANSKY, SILER, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Cole would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER
OF THE COURT

s/Leonard Green
Leonard Green, Clerk /n